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Political Trust as the Basis for a Social Rights Enforcement Framework

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The longstanding conversation around social rights enforcement has come in waves. The “first wave” was focused on the justiciability of social rights, whereas the “second wave” has debated how courts should enforce such rights. Situating itself within the second wave, this article argues that political trust—the trust which citizens hold in government actors—offers a promising basis for a legal framework for enforcing social rights in contemporary social democracies.

The author offers three justifications for why we should use political trust as the basis for such a framework: an instrumental justification arising out of political trust’s value to contemporary social democracies; a theoretical justification stemming from the fiduciary nature of the citizen-government relationship; and a practical justification connected with the “two wrongs” of social rights enforcement. With those three justifications offered, the author then takes steps to conceptualize political trust in the specific context of social rights. This conceptualization revolves around certain expectations held by citizens with respect to government conduct, specifically an expectation that the government will exercise goodwill toward its citizens, fulfill its fiduciary responsibility to citizens, and act competently. This conceptualization provides us with some insight into what a political trust-based framework for enforcing social rights would entail.

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Introduction

Social scientists have long explored the concept of trust. They have sought to define what trust is, to explain how it operates in contemporary societies and to understand its relationship with the critical end of cooperation. And owing in large part to the relationship between trust and cooperation, legal scholars—equipped with the body of literature yielded by such social scientific exploration—have, in turn, taken steps to use the concept of trust to better understand and advance their respective fields of law.¹ This article draws inspiration from that body of legal research. It seeks to employ trust—specifically, the trust which citizens hold in government actors (what I broadly call “political trust”)—to contribute to a contentious area of legal scholarship: the judicial enforcement of constitutional social rights.²

1. See Anthony J Bellia Jr, “Promises, Trust, and Contract Law” (2002) 47 Am J Juris 25; Margaret M Blair & Lynn A Stout, “Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law” (2001) 149:6 U Pa L Rev 1735; Roger Cotterrell, “Trusting in Law: Legal and Moral Concepts of Trust” (1993) 46:2 Current Leg Probs 75; Frank B Cross, “Law and Trust” (2005) 93:5 Geo LJ 1457; Mark A Hall, “Law, Medicine, and Trust” (2002) 55:2 Stan L Rev 463; Mark A Hall, “The Importance of Trust for Ethics, Law, and Public Policy” (2005) 14:2 Cambridge Q Healthcare Ethics 156; Matthew Harding, “Manifesting Trust” (2009) 29:2 Oxford J Leg Stud 245 [Harding, “Manifesting Trust”]; Matthew Harding, “Responding to Trust” (2011) 24:1 Ratio Juris 75; Matthew Harding, “Trust and Fiduciary Law” (2013) 33:1 Oxford J Leg Stud 81 [Harding, “Trust and Fiduciary Law”].

2. The focus of this article is *constitutional* social rights: that is, those social rights which are protected under a national constitution—either expressly or implicitly (and read into the relevant constitution by a national court).

There is presently a debate over how courts in contemporary social democracies can and should enforce constitutional social rights.³ This debate forms part of a larger, longstanding conversation among scholars, politicians and jurists around social rights enforcement. In its “first wave”, the focus of the conversation was on the justiciability of social rights—that is, whether constitutional social rights are enforceable by courts.⁴ That wave reached its peak during the late 1980s to early 1990s when the new democracies of the Global South and the former Soviet Union were deciding whether to include express (and enforceable) social rights provisions in their respective constitutions. The arguments against social rights’ justiciability fell into two principal categories: institutional legitimacy and institutional capacity. The argument from legitimacy posited that social rights matters, having significant budgetary consequences as well as the potential to shape what society looks like, are best left to the elected—and politically accountable—branches of government. Courts, being unelected, lack legitimacy to interfere with or second-guess those branches’ decisions or actions. The argument from capacity suggested that courts should not decide social rights matters since those matters raise polycentric problems which are not suitable for adjudication and because the courts lack the expertise and resources necessary to decide such matters.⁵

However, after intense debate (including social rights scholars forcefully challenging the various assumptions underlying the arguments from legitimacy and capacity), many new democracies ultimately opted for the inclusion of

3. When I refer to social rights “enforcement” in this article, I mean specifically enforcement by *courts*.

4. Richard Stacey, “Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights” (2017) 31:1 Notre Dame JL Ethics & Pub Pol’y 85 at 85–86. I draw the language of “first wave” and “second wave” from this article (*ibid*).

5. For a summary of these arguments (although not in support of them), see Cécile Fabre, “Constitutionalising Social Rights” (1998) 6:3 J Political Philosophy 263 at 280–81; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 93–96 [Fredman, *Human Rights Transformed*]; Roberto Gargarella, “Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights” in Helena Alviar Garcia, Karl Klare & Lucy A Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Inquiries* (New York: Routledge, 2015) 105 at 107.

social rights in their constitutions.⁶ Moreover, in more established democracies, several courts have read social rights into their constitutions.⁷ And most scholars, jurists and politicians have now come to accept social rights' justiciability, recognizing that the arguments from legitimacy and capacity do not support the conclusion that social rights are non-justiciable but, rather, that "caution is warranted" in their enforcement.⁸ So, following from this, the social rights enforcement conversation (which is now in its "second wave") is no longer focused on whether social rights are enforceable by courts, but, assuming they are, how courts should enforce them.⁹

In recognition of the apparent shift in the social rights enforcement conversation, as well as in an effort to continue moving the conversation forward, I start my argument from the position that social rights are justiciable. Therefore, it is not my intention to contribute to the first wave (justiciability) debate—at least not directly.¹⁰ This is not to say that the arguments from legitimacy and capacity are without merit. But to repeat, those arguments do not warrant the

6. See Courtney Jung, Ran Hirschl & Evan Rosevear, "Economic and Social Rights in National Constitutions" (2014) 62:4 *American J Comp L* 1043 at 1053 (more than ninety per cent of these constitutions contain at least one social or economic right and seventy per cent contain at least one which is explicitly justiciable).

7. See e.g. Bundesverfassungsgericht [Federal Constitutional Court], *Judgement of the First Senate of 9 February 2010*, 1 BvL 1/09 (Germany); *Olga Tellis & Ors v Bombay Municipal Corporation & Ors*, 1985 SCC (3) 545, [1985] 2 Supp SCR 51 (India); *Hassan v National Insurance Institute* (2012), HCJ 10662/04, HCJ 3282/05 (Israel).

8. Colm O'Cinneide, "Legal Accountability and Social Justice" in Nicholas Bamforth & Peter Leyland, eds, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013) 389 at 401. See also Jeff King, *Judging Social Rights* (Cambridge, UK: Cambridge University Press, 2012) at 8.

9. See David Landau, "The Reality of Social Rights Enforcement" (2012) 53:1 *Harv Intl LJ* 189 at 196; Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, UK: Cambridge University Press, 2008) 3 at 29; Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20:3 *SAJHR* 383 at 404–05; Anashri Pillay, "Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom" [2013] *Public L* 599 at 599.

10. I say "not directly" because the argument which I advance in this article, by suggesting a means for courts to enforce social rights, also (albeit indirectly) offers a justification for those rights' justiciability in the first place.

conclusion that social rights are non-justiciable; they warrant *caution* in courts' enforcement of those rights. This article thus seeks to contribute to the second wave debate; and consequently, it addresses the question of *how* courts should enforce social rights.

Other commentators—in contribution to this second wave debate—have proposed an array of frameworks for social rights enforcement, rooting those frameworks in ideas which include inter-institutional dialogue,¹¹ democratic experimentalism,¹² deliberative democracy¹³ and judicial incrementalism.¹⁴ In this article, I argue that the concept of political trust, as it has been conceptualized in the social science literature, is of value to this debate. Specifically, I advance the claim that political trust offers a promising basis for a legal framework for enforcing social rights in contemporary social democracies.¹⁵ Put simply, I want to suggest that courts, in fulfilling their constitutional role as enforcers of social rights, should turn to the concept of political trust, employing it as a sort of adjudicative tool for defining governments' enforceable obligations to citizens with respect to social rights.¹⁶

Now, given the breadth of the political trust concept as well as the many complexities raised by social rights enforcement, this article cannot set out a comprehensive political trust-based framework for enforcing social rights. And thus, that is not my aim in this article. My aim, rather, is to introduce the concept

11. See Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" (2007) 5:3 Intl J Constitutional L 391.

12. See Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39:2 Colum HRLR 351 at 395.

13. See Fredman, *Human Rights Transformed*, *supra* note 5.

14. See King, *supra* note 8 (these frameworks have been proposed as alternatives to highly interventionist approaches, being arguably more democratically defensible than the latter given courts' institutional limitations).

15. It is well recognized that social rights give rise to a tripartite set of duties on government: to respect (a duty of non-interference), to protect (a duty to prevent interference or denial by third parties) and to fulfill (a duty to positively provide). The latter duty is my primary concern as it raises the greatest issues of public resource allocation, thereby making it the main reason why social rights, and their enforcement, are controversial.

16. As I note later in the article, I do not mean "citizens" in the sense of citizenship as legal status. Rather, I use the term to refer to that group of individuals who are afforded the constitutional protection of social rights.

of political trust to the above social rights enforcement debate, justifying why the concept offers a promising basis for an enforcement framework as well as taking steps to conceptualize it in the context of this debate. Consequently, this article presents what may be considered the beginnings of such a political trust-based framework.

I advance my claim in three parts. In Part I, I elaborate a bit upon what I mean by “political” trust. Then, in Part II, I offer three justifications for why political trust offers a promising basis for a social rights enforcement framework. They are: (a) the instrumental value of political trust to contemporary social democracies (an instrumental justification); (b) drawing on the body of fiduciary political theory literature, the fiduciary nature of the relationship between citizens and their government with respect to social rights (a theoretical justification); and (c) the capacity of a political trust-based framework to strike an appropriate balance between what has been called the “two wrongs” of social rights enforcement—judicial usurpation and judicial abdication (a practical justification). And finally, having justified its value in this area, I take steps in Part III to conceptualize political trust in the specific context of social rights. My conceptualization in this regard provides us with some insight into what a political trust-based framework for enforcing social rights would entail.

I. What Do I Mean by “Political” Trust?

In the social science literature, trust has frequently been described as involving a three-part relationship between a trustee (A), a truster (B) and a good or service which the trustee controls and which the truster either needs or wants (X).¹⁷ That relationship takes the form of “B trusts A with respect to X”. As I noted earlier, by political trust I mean the trust which citizens hold in government actors.¹⁸ Accordingly, when I speak of political trust, A in this three-part relationship refers to government, B refers to citizens and X refers to

17. See e.g. Annette Baier, “Trust and Antitrust” (1986) 96:2 *Ethics* 231; Richard Holton, “Deciding to Trust, Coming to Believe” (1994) 72:1 *Australasian J Philosophy* 63; Russell Hardin, “Conceptions and Explanations of Trust” in Karen S Cook, ed, *Trust in Society* (New York: Russell Sage Foundation, 2001) 3 [Hardin, “Conceptions and Explanations of Trust”].

18. To be clear, I include in the term “government actors” individuals as well as institutions. See Bernard Barber, *The Logic and Limits of Trust* (New Brunswick, NJ: Rutgers University

the many social goods and services at issue in social rights (e.g., those pertaining to health care, housing, education, etc.) which governments control and which citizens need from government. For ease of reference, I call this three-part relationship the “citizen-government relationship”.

In referring to government, I am referring specifically to the elected or representative branches of government (the “elected branches”).¹⁹ In there, I include the legislature and the executive (which, in turn, includes civil servants and the various administrative agencies relevant to social welfare).²⁰ Next, when I refer to “citizens”, I do not mean it in the sense of citizenship as legal status. I use the term, rather, to denote those afforded the protection of constitutional social rights. Hence, depending on the jurisdiction, citizens may include residents and individuals of other legal status. And lastly, the social goods and services which X represents depend on the right at issue; but generally, X denotes physical goods, personnel, infrastructure, equipment, and benefits or services. The legislature exercises its control over those social goods and services by contributing amendments to and promulgating the primary legislation which defines the parameters of state-delivered social programs, as well as endorsing

Press, 1983) at 18; Henry Farrell, “Institutions and Midlevel Explanations of Trust” in Karen S Cook, Margaret Levi & Russell Hardin, eds, *Whom Can We Trust? How Groups, Networks, and Institutions Make Trust Possible* (New York: Russell Sage Foundation, 2009) 127 at 132–33; Rom Harré, “Trust and its Surrogates: Psychological Foundations of Political Process” in Mark E Warren, ed, *Democracy and Trust* (Cambridge, UK: Cambridge University Press, 1999) 249 at 259–60; Jörg Sydow, “Understanding the Constitution of Interorganizational Trust” in Christel Lane & Reinhard Bachmann, eds, *Trust Within and Between Organizations: Conceptual Issues and Empirical Applications* (Oxford: Oxford University Press, 1998) 31 at 43–44.

19. I use “elected branches” and “elected branches of government” interchangeably. Also, I am assuming an unelected judiciary. And seeing as my aim is the development of a social rights enforcement framework, I exclude the judiciary from the term “government actors”.

20. I have chosen to collapse the legislative and executive branches of government into a single trustee for two reasons. First, as I explained earlier, this article seeks to contribute to the current debate on the judicial enforcement of constitutional social rights. The orthodoxy in that literature is to focus on the tripartite relationship between citizens, the elected branches and the courts. Second, from a purely practical perspective, most of the literature on political trust which I am relying upon for my analysis here does not draw much of a distinction between the legislature and the executive. Rather, there is a tendency in that literature to speak of the relationship between citizens and their government at a more general level. Accordingly, I think that it is best for me to maintain my analysis at an equally general level.

the budget which allows the state to fund (and deliver) programs; the executive exercises its control by preparing the bulk of primary legislation introduced to the legislature, and then, by supplementing, amplifying and implementing that legislation through a range of administrative action.²¹ These legislative and administrative steps are prerequisites to the state-delivered social programs that grant citizens access to the social goods and services. Further, because social rights are said to promise social goods and services which citizens need in order to lead a decent life, I am assuming that in the citizen-government relationship, the social goods and services at issue are not merely wanted—but needed—by citizens.²²

II. Justifying Political Trust as the Basis for an Enforcement Framework

A. An Instrumental Justification

The first justification which I put forward for why political trust offers a promising basis for a social rights enforcement framework parallels the principal reason why scholars in other fields of law have turned to trust in their scholarship: the relationship between trust and cooperation. In the political context generally, when citizens have trust in government actors, they are more likely to regard government actions as legitimate and to cooperate with those actors, tolerating the political regime and voluntarily complying with laws and government demands.²³ Such cooperation is critical because it allows the state

21. See King, *supra* note 8 at 41–48; Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance” (2004) 42:3 Osgoode Hall LJ 363 at 364–65.

22. See Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000) at 7. See generally King, *supra* note 8.

23. See Russell J Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (Oxford: Oxford University Press, 2004); Sofie Marien & Marc Hooghe, “Does Political Trust Matter? An Empirical Investigation into the Relation Between Political Trust and Support for Law Compliance” (2011) 50:2 European J Political Research 267; Pippa Norris, “Conclusions: The Growth of Critical Citizens and Its Consequences” in Pippa Norris, ed, *Critical Citizens: Global Support for Democratic Government* (Oxford: Oxford University Press, 1999) 257.

to focus its limited resources for coercion on the relatively few disobedient citizens.²⁴ As Russell Dalton has explained, “democracy functions with minimal coercive force because of the legitimacy of the system and the voluntary compliance of the public. Declining feelings of political trust . . . can undermine this relationship and thus the workings of democracy”.²⁵ And therefore, as citizens’ voluntary compliance with laws and government demands becomes the norm for a democracy, citizen cooperation translates into an overall system of social stability.²⁶

In the social rights context, this relationship has two ramifications which make political trust of the utmost importance. First, because of that relationship, political trust is imperative to the financing of state-delivered social programs.²⁷ State-provided social goods and services depend on resources, which citizens provide in the form of taxes. Using the revenue collected from those taxes, the state is able to provide said goods and services by delivering social programs. Consequently, taxes operate as “the economic glue of social programs, the source of government’s ability to transfer resources—and, indeed, to function at all”.²⁸ And following from this fact, we can fairly conclude that the “future of the welfare state is likely to hinge on the ability for nation states to levy taxes . . . on their populations”.²⁹ But citizens’ compliance with tax laws (a form of cooperation) depends

24. See Russell Hardin, “Trust in Government” in Valerie Braithwaite & Margaret Levi, eds, *Trust and Governance*, vol 1 (New York: Russell Sage Foundation, 1998) 9 at 10.

25. Dalton, *supra* note 23 at 159.

26. See *ibid* at 165.

27. See Joseph S Nye Jr, “Introduction: The Decline of Confidence in Government” in Joseph S Nye Jr, Philip D Zelikow & David C King, eds, *Why People Don't Trust Government* (Cambridge, Mass: Harvard University Press, 1997) 1; Bo Rothstein, Marcus Samanni & Jan Teorell, “Explaining the Welfare State: Power Resources vs. the Quality of Government” (2012) 4:1 *European Political Science Rev* 1; Stefan Svallfors, “Introduction” in Stefan Svallfors, ed, *The Political Sociology of the Welfare State: Institutions, Social Cleavages and Orientations* (Stanford: Stanford University Press, 2007) 1.

28. Eric M Uslaner, “Tax Evasion, Trust, and the Strong Arm of the Law” in Nicolas Hayoz & Simon Hug, eds, *Tax Evasion, Trust and State Capacities* (Bern: Peter Lang, 2007) 17 at 19.

29. Nathalie Morel & Joakim Palme, “Financing the Welfare State and the Politics of Taxation” in Bent Greve, ed, *The Routledge Handbook of the Welfare State*, 1st ed (New York: Routledge, 2013) 401 at 407.

on their trust in government.³⁰ Put simply, citizens who do not trust their government are less likely to pay their taxes. Research by John Scholz and Mark Lubell offers empirical support for this conclusion.³¹ In an analysis of United States Internal Revenue Service survey data (combined with in-person interviews), they found that trust in government significantly increased the likelihood of respondents' tax compliance. This relationship persisted even after controlling for the influence of self-interested fear of getting caught and an internalized sense of duty. Scholz and Lubell concluded that "trust in government . . . significantly influence[s] tax compliance".³² Further, Steven Sheffrin and Robert Triest, in a study analyzing the same survey data as Scholz and Lubell, found that respondents' attitudes toward government (including a belief that tax money is wasted by government) was the best predictor of underreporting income and overstating deductions.³³ Such attitudes were even a better predictor than the probability of detection and whether fellow citizens paid their fair share.³⁴

Second, and relatedly, political trust has bearing on whether citizens support social policies (including whether they agree to public resources being put toward those policies and whether they agree to tax increases in support of those policies). In this regard, political trust functions as a cognitive heuristic which citizens rely upon when forming opinions about social policies.³⁵ Faced with

30. For a general summary, see Norris, *supra* note 23; Nye, *supra* note 27.

31. See John T Scholz & Mark Lubell, "Trust and Taxpaying: Testing the Heuristic Approach to Collective Action" (1998) 42:2 Am J Pol Sc 398. See also John T Scholz, "Trust, Taxes, and Compliance" in Braithwaite & Levi, *supra* note 24, 135; John T Scholz & Neil Pinney, "Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior" (1995) 39:2 Am J Pol Sc 490.

32. Scholz & Lubell, *supra* note 31 at 412.

33. See Steven M Sheffrin & Robert K Triest, "Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance" in Joel Slemrod, ed, *Why People Pay Taxes: Tax Compliance and Enforcement* (Ann Arbor: University of Michigan Press, 1992) 193 at 214–15.

34. See also Dalton, *supra* note 23 at 158–59; Margaret Levi & Audrey Sacks, "Legitimizing Beliefs: Sources and Indicators" (2009) 3:4 Regulation & Governance 311 at 311; Kristina Murphy, "The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders" (2004) 28:2 L & Human Beh 187.

35. See Marc J Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* (Princeton: Princeton University Press, 2005); Thomas J Rudolph, "Political Trust, Ideology, and Public Support for Tax Cuts" (2009) 73:1 Public Opinion Q 144 at 144–45.

the complex institutional arrangements of the welfare state and the uncertain consequences of social policies, citizens turn to trust: “Other things equal, if people perceive the architect of policies as untrustworthy, they will reject its policies; if they consider it trustworthy, they will be more inclined to embrace them.”³⁶ The more citizens assess their government to be trustworthy, the more likely they are to grant it “contingent consent”.³⁷ That is, they are more likely to support a social policy (or at least to tolerate it) even if they perceive the likely outcome of that policy to be unfavourable for them.³⁸ And such consent includes agreeing with public resources being put toward those policies and to tax increases in support of them. Hence, aside from trust’s relevance as an influence on citizens’ provision of critical resources in the form of tax money, trust is also—as a heuristic linked to citizen support for social policies—in itself “the critical resource for government”.³⁹

Again, there is a body of empirical research to back the claim that political trust affects citizens’ support for social policies. Virginia Chanley and her colleagues have offered convincing evidence on this front.⁴⁰ Specifically, using US survey data, their study examined the relationship between public trust in government and what they refer to as “policy mood” (a measure reflecting “the extent of public support for increased government spending and activity across a range of domestic policy areas, including education, health care, welfare, aid to cities, and the environment”).⁴¹ They found a positive correlation: greater trust in government correlated with greater policy mood. Chanley and her colleagues concluded that their findings were “consistent with theoretical expectations concerning the importance of trust in government for public

36. Hetherington, *supra* note 35 at 51.

37. Margaret Levi, *Consent, Dissent and Patriotism* (Cambridge, UK: Cambridge University Press, 1997) at 20–21 [Levi, “Consent, Dissent and Patriotism”].

38. See Oscar W Gabriel & Eva-Maria Trüdinger, “Embellishing Welfare State Reforms?: Political Trust and the Support for Welfare State Reforms in Germany” (2011) 20:2 *German Politics* 273 at 275.

39. Eva-Maria Trüdinger & Uwe Bollow, “Evaluations of Welfare State Reforms in Germany: Political Trust Makes a (Big) Difference” in Sonja Zmerli & Marc Hooghe, eds, *Political Trust: Why Context Matters* (Colchester, UK: ECPR Press, 2011) 187 at 189.

40. See Virginia A Chanley, Thomas J Rudolph & Wendy M Rahn, “The Origins and Consequences of Public Trust in Government: A Time Series Analysis” (2000) 64:3 *Public Opinion Q* 239.

41. *Ibid* at 245.

willingness to commit public resources for policy ends”.⁴² A study conducted by Stefan Svallfors using Swedish survey data yielded similar findings to those of Chanley and her colleagues.⁴³ In fact, Sven Steinmo—in his comparative work on welfare states—has persuasively argued that the difference in the size of the welfare state in Sweden as compared with that of the US is attributable to a difference in political trust (rather than a difference in citizen want for government spending, as is usually presumed).⁴⁴ In interviews which he conducted with citizens of Sweden, Britain and the US, Steinmo found that the vast majority—including Americans—said that they would agree to an increase in their taxes if they “could be guaranteed that increased government spending would be efficiently and effectively used to address society’s problems”.⁴⁵ He found, however, that American respondents were especially likely to follow up their response by saying that they did “not believe that revenue from higher taxes would be used efficiently or effectively and therefore they would not approve tax increases”.⁴⁶

The tax compliance and social policy support which follow from political trust are especially important given present circumstances, which make the public funding and delivery of social goods and services ever more challenging. In 2001, Paul Pierson wrote that the welfare state in affluent democracies faces a context of permanent austerity.⁴⁷ By this he meant that owing to a set of

42. *Ibid* at 253.

43. See Stefan Svallfors, “Political Trust and Support for the Welfare State: Unpacking a Supposed Relationship” in Bo Rothstein & Sven Steinmo, eds, *Restructuring the Welfare State: Political Institutions and Policy Change* (Basingstoke, UK: Palgrave MacMillan, 2002) 184.

44. See Sven Steinmo, *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State* (New Haven: Yale University Press, 1993) [Steinmo, *Taxation and Democracy*]. See also Sven H Steinmo, “American Exceptionalism Reconsidered: Culture or Institutions?” in Lawrence C Dodd & Calvin Jillson, eds, *The Dynamics of American Politics: Approaches and Interpretations* (Boulder: Westview Press, 1994) 106.

45. Steinmo, *Taxation and Democracy*, *supra* note 44 at 199.

46. *Ibid*. See also Eun Young Nam & Myungsook Woo, “Who Is Willing to Pay More Taxes for Welfare? Focusing on the Effects of Diverse Types of Trust in South Korea and Taiwan” (2015) 44:2 *Development & Society* 319; Trüdinger & Bollow, *supra* note 39.

47. See Paul Pierson, “Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies” in Paul Pierson, ed, *The New Politics of the Welfare State* (Oxford: Oxford University Press, 2001) 410.

circumstances, which have generated much fiscal stress for countries (including changes in the global economy, a slowdown in economic growth, aging populations and reduced fertility rates), it is increasingly difficult for governments to finance previously made commitments to social goods and services. Contrary to then-popular beliefs, Pierson prophesied that given persistent citizen support for the welfare state, the consequence of these pressures would not be the entire dismantling of the welfare state, but moderate cost-cutting efforts by governments. According to Pierson, “neither the alternatives of standing pat or dismantling are likely to prove viable in most countries”.⁴⁸ Instead, “we should expect strong pressures to move towards more centrist—and therefore more incremental—responses. Those seeking to generate significant cost reductions while modernizing particular aspects of social provision will generally hold the balance of political power.”⁴⁹

Over the past fifteen years, we have witnessed these sorts of cost-cutting efforts in affluent and developing democracies alike.⁵⁰ And the 2008 Global Financial Crisis has not helped.⁵¹ While the period immediately after the Crisis saw most countries increase public spending (by introducing fiscal stimulus programs), by 2010, that trend reversed itself and premature budget cuts—as austerity measures—became widespread.⁵² A review of austerity trends in 187 countries between 2010 and 2020 found that by 2011, the majority of sampled countries reduced their budgets, with an average reduction of 2.3% of GDP.⁵³ It was projected that this contraction in public spending would intensify

48. *Ibid* at 417.

49. *Ibid*.

50. See James Connelly, “Conclusion: Remaining the Welfare State?” in James Connelly & Jack Hayward, eds, *The Withering of the Welfare State: Regression* (Basingstoke, UK: Palgrave Macmillan, 2012) 208; Staffan Kumlin, “Overloaded or Undermined?: European Welfare States in the Face of Performance Dissatisfaction” in Svallfors, *supra* note 27, 80.

51. See Aoife Nolan, “Introduction” in Aoife Nolan, ed, *Economic and Social Rights After the Global Financial Crisis* (Cambridge, UK: Cambridge University Press, 2014) 1 at 1–4.

52. See Isabel Ortiz et al, “The Decade of Adjustment: A Review of Austerity Trends 2010-2020 in 187 Countries” (2015) Extension of Social Security Working Paper No 53 at 9, online (pdf): <www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53192>. See also *ibid* at 3.

53. See Ortiz et al, *supra* note 52 at 2.

at least into 2020. And such contraction is not limited to affluent democracies; on the contrary, public spending contraction has been, and is projected to be, most severe in developing democracies.⁵⁴

Given the current state of events, it may be that now—more than ever—governments need their citizens to pay taxes and to support their social policies. If not, these two factors, coupled with the effects of the Global Financial Crisis and the circumstances which have given rise to permanent austerity, will seriously endanger governments' ability to provide social goods and services. To be blunt, without such taxes and support, there likely will be no such goods and services; and so, political trust may be critical to the future of social rights.⁵⁵

Before moving onto my second justification, I will make one point of clarification. Many writers on trust have emphasized that political trust is not always a good thing. It can, in some cases, be detrimental to democracy.⁵⁶ These writers have suggested that, in such cases, distrust or skepticism from citizens is beneficial because it “keeps constituents alert, and therefore public officials responsive”.⁵⁷ It has thus been said that “healthy skepticism of citizens is a prerequisite of democracy”.⁵⁸ I do not dispute this argument. But in my view, the cases about which these writers are concerned are where government shows itself to not be worthy of citizens' trust. Where government shows itself to be untrustworthy, of course citizens should not blindly or indiscriminately

54. See *ibid* at 53.

55. With that said, a word of caution is warranted: political trust also presents a danger (given its connection to public support for policies). That danger is that citizens will support regressive policies. In light of this danger, if we do employ trust as the basis for a social rights enforcement framework (as I am suggesting), we will also need to introduce some degree of caution. See Trüdinger & Bollow, *supra* note 39.

56. See Karen S Cook, Russell Hardin & Margaret Levi, *Cooperation Without Trust?* (New York: Russell Sage Foundation, 2005) at 165; Margaret Levi, “A State of Trust” in Braithwaite & Levi, *supra* note 24, 77 at 95–96 [Levi, “A State of Trust”]; Mark E Warren, “Trust and Democracy” in Eric M Uslaner, ed, *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2018) 75 at 81 [Warren, “Trust and Democracy”]; Mark E Warren, “What Kinds of Trust Does a Democracy Need? Trust from the Perspective of Democratic Theory” in Sonja Zmerli & Tom WG van der Meer, eds, *Handbook on Political Trust* (Cheltenham, UK: Edward Elgar, 2017) 33 at 35 [Warren, “What Kinds of Trust”].

57. Cook, Hardin & Levi, *supra* note 56 at 165.

58. Levi, “A State of Trust”, *supra* note 56 at 96.

trust; they should be skeptical. And in such cases, more trust should not be our aim.⁵⁹ However, as I will explain shortly, a political trust-based framework for enforcing social rights would seek to create conditions which foster citizens' trust in the elected branches with respect to social rights (rather than seek to increase such trust without any foundation for it).⁶⁰ As such, its focus would be on what we may call "warranted" political trust.⁶¹ And such trust, it has been argued, is beneficial for democracy.⁶²

B. A Theoretical Justification

My second justification for why political trust offers a promising basis for a social rights enforcement framework is theoretical in character. And it stems from the nature of the citizen-government relationship. Specifically, I argue that the citizen-government relationship may be fairly characterized as a fiduciary relationship. And it follows from that, based on a line of reasoning advanced in the private law fiduciary literature, that the objective of social rights enforcement should be to facilitate citizen trust in the citizen-government relationship.

First of all, in making the claim that the citizen-government relationship is a fiduciary relationship, I rely in substantial part upon an important body of work developed by public law scholars in the last fifteen years or so which has emphasized the fiduciary foundations of public authority—a body broadly

59. As Onora O'Neill has put it, "it is foolish to assume that we should always, or indeed generally, seek to 'restore trust' or to 'build more trust'. Where we have to deal with untrustworthy persons or institutions it would be a bad idea to aim for more trust". Onora O'Neill, "Accountable Institutions, Trustworthy Cultures" (2017) 9:2 Hague J on Rule L 401 at 406.

60. See Cook, Hardin & Levi, *supra* note 56; Onora O'Neill, *A Question of Trust* (Cambridge, UK: Cambridge University Press, 2002).

61. See Mark E Warren, "Introduction" in Warren, *supra* note 18, 1 at 4; Mark E Warren, "Democratic Theory and Trust" in Warren, *supra* note 18, 310 [Warren, "Democratic Theory and Trust"]. Relatedly, O'Neill has suggested that what we need in public life is an "intelligent conception of trust"—that is, trust which is "well placed". Onora O'Neill, "Trust, Trustworthiness, and Accountability" in Nicholas Morris & David Vines, eds, *Capital Failure: Rebuilding Trust in Financial Services* (Oxford: Oxford University Press, 2014) 172 at 178.

62. See Warren, "What Kinds of Trust", *supra* note 56; Warren, "Trust and Democracy", *supra* note 56.

described as “fiduciary political theory”.⁶³ Scholars in this camp have argued that various relationships in the political realm (including those between political representatives and the people, judges and the people, and administrative agencies and the people) are fairly characterized as fiduciary in nature. Here, I make a similar suggestion in the social rights context with respect to the citizen-government relationship.⁶⁴

To support my suggestion, I will employ Evan Fox-Decent’s conceptualization of a fiduciary relationship (developed to advance his claim that the state-subject relationship is fiduciary in nature).⁶⁵ For him, three conditions are necessary and sufficient for a fiduciary relationship to arise: (a) the fiduciary must have “administrative”, discretionary power over some set of the beneficiary’s interests; (b) the beneficiary must be “incapable of controlling the fiduciary’s exercise of

63. For a representative sample, see Evan J Criddle, “Fiduciary Foundations of Administrative Law” (2006) 54:1 UCLA L Rev 117; Evan Fox-Decent, “The Fiduciary Nature of State Legal Authority” (2005) 31:1 Queen’s LJ 259 [Fox-Decent, “Fiduciary Nature”]; Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) [Fox-Decent, *Sovereignty’s Promise*]; Ethan J Leib, David L Ponet & Michael Serota, “A Fiduciary Theory of Judging” (2013) 101:3 Cal L Rev 699 [Leib, Ponet & Serota, “Fiduciary Theory of Judging”]; D Theodore Rave, “Politicians as Fiduciaries” (2013) 126:3 Harv L Rev 671. The terminology of “fiduciary political theory” was coined by Ethan Leib and colleagues. See Ethan J Leib, David L Ponet & Michael Serota, “Translating Fiduciary Principles into Public Law” (2013) 126 Harv L Rev Forum 91.

64. It is beyond the scope of this article, however, to argue this point fully (i.e., with reference to the legal framework in a particular jurisdiction (as the above scholars have done in their respective works)). Moreover, I recognize that fiduciary political theory has its critics. See e.g. Seth Davis, “The False Promise of Fiduciary Government” (2014) 89:3 Notre Dame L Rev 1145; Timothy Endicott, “Equity and Administrative Behaviour: A Commentary” in PG Turner, ed, *Equity and Administration* (Cambridge, UK: Cambridge University Press, 2016) 367; Ethan J Leib & Stephen R Galoob, “Fiduciary Political Theory: A Critique” (2016) 125:7 Yale LJ 1820. That said, for the reasons which scholars in this camp have put forward, I think that fiduciary political theory holds significant promise and I suggest that it can be applied to the citizen-government relationship. For a response to the above critiques, see Evan Fox-Decent, “Challenges to Public Fiduciary Theory: An Assessment” in D Gordon Smith & Andrew S Gold, eds, *Research Handbook on Fiduciary Law* (Cheltenham, UK: Edward Elgar, 2018) 379 [Fox-Decent, “Challenges to Public Fiduciary Theory”].

65. There is a difference of opinion in the literature as to what characterizes a fiduciary relationship. I employ Fox-Decent’s conceptualization because there is significant overlap between his conceptualization and those of others, it is rooted in case law, and his work has been highly influential in the fiduciary political theory field.

power”; and (c) the beneficiary’s relevant interests must be “capable of forming the subject matter of a fiduciary obligation”.⁶⁶ I will now consider each.

Fox-Decent’s first condition has two sub-conditions: (i) the fiduciary must exercise discretionary power over a set of the beneficiary’s interests; and (ii) that power must be administrative in nature—i.e., it must be “institutional” (the exercise of power takes place in an institution which has its own substantive values and internal practices), “purpose-laden” (the power is exercised for some purpose) and “other-regarding” (that purpose involves a party other than the fiduciary).⁶⁷ Both sub-conditions are satisfied in the citizen-government relationship. As for (i), it will be recalled that the social goods and services at issue in social rights are things which citizens need; and as such, citizens have an interest in obtaining them. Also recall that the elected branches exercise control over those social goods and services through the legislative and administrative steps outlined earlier (i.e., the preparation, development and promulgation of primary legislation, the preparation and approval of the budget, and subsequent administrative action). Because in each of those steps, the elected branches exercise significant discretion, it is fair to say that the elected branches exercise discretionary power over a set of citizens’ interests (i.e., vis-à-vis those goods and services).⁶⁸

With respect to (ii), I submit that the elected branches’ discretionary power in this regard is administrative in nature. Its institutional character is obvious.

66. Fox-Decent, *Sovereignty’s Promise*, *supra* note 63 at 93–94. These three conditions are consistent with what Leib, Ponet and Serota have identified as the three indicia of fiduciary relationships: discretion, vulnerability and trust. See Leib, Ponet & Serota, “Fiduciary Theory of Judging”, *supra* note 63 at 706. For additional support for my suggestion, see Laura S Underkuffler, “Property, Sovereignty, and the Public Trust” (2017) 18:2 *Theor Inq L* 329; Laura S Underkuffler, “Fiduciary Theory: The Missing Piece for Positive Rights” in Evan Criddle et al, eds, *Fiduciary Government* (Cambridge, UK: Cambridge University Press) [forthcoming in December 2018]. Underkuffler has used fiduciary political theory to ground positive social rights. In doing so, she characterizes the citizen-government relationship as fiduciary in nature (though she does so using a broader idea of that relationship than I do).

67. See Fox-Decent, *Sovereignty’s Promise*, *supra* note 63 at 101.

68. See Robert E Goodin, “Welfare, Rights and Discretion” (1986) 6:2 *Oxford J Leg Stud* 232; Robert E Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton: Princeton University Press, 1988); Sossin, *supra* note 21; Richard M Titmuss, “Welfare ‘Rights’, Law and Discretion” (1971) 42:2 *Pol Q* 113.

As for its being purpose-laden and other-regarding, it satisfies these elements for two reasons. The first is the overarching fact of sovereignty (which Fox-Decent has used to argue that the state's power over its subjects is purpose-laden and other-regarding).⁶⁹ According to Fox-Decent, because the state assumes sovereign powers (which it exercises through its institutions), subjects have no choice but to "entrust the specification, administration, adjudication, and vindication of their rights to the state".⁷⁰ And for that reason, Fox-Decent has argued, the state exercises its sovereign powers for the purpose of benefiting its subjects. Included in those rights are social rights whose administration and specification citizens have no choice but to entrust to the state (and by extension, the elected branches which exercise its powers). Thus, I think that Fox-Decent's argument may be fairly extended to the citizen-government relationship. Second, there is a good argument that citizens, via their payment of taxes, specifically entrust social goods and services to the state (and again by extension, to the elected branches).⁷¹ Both of the above points—the fact of sovereignty and citizens' specific entrustment of social goods and services to the elected branches via their payment of taxes—support the same conclusion: that the elected branches' discretionary power over citizens' interests vis-à-vis the relevant social goods and services is exercised for the purpose of benefiting citizens. And owing to that conclusion, their power may be characterized as both purpose-laden and other-regarding.

The second condition of a fiduciary relationship is that the beneficiary is incapable of controlling the fiduciary's exercise of power—and following from that fact, the beneficiary is vulnerable to abuses of the fiduciary's power.⁷² This condition is also satisfied in the citizen-government relationship. As Fox-Decent has argued for the state-subject relationship, "[p]rivate parties have no authority to . . . exercise the powers necessary to determine" their rights: "they

69. See Fox-Decent, *Sovereignty's Promise*, *supra* note 63 at 29. Owing to this overarching fact of sovereignty, Fox-Decent has recognized that "with respect to the legislative, executive, and judicial powers entailed by sovereignty, they each in their own familiar ways are institutional, purpose-laden, and other-regarding" (*ibid* at 112).

70. *Ibid* at 111.

71. See Charles A Reich, "The New Property" (1964) 73:5 Yale LJ 733; John Allett, "New Liberalism & the New Property Doctrine: Welfare Rights as Property Rights" (1987) 20:1 Polity 57.

72. See Fox-Decent, *Sovereignty's Promise*, *supra* note 63 at 101.

do not get to make laws that apply to others” and so, “are juridically incapable of exercising public authority”.⁷³ This argument applies no less to the citizen-government relationship. Aside from their limited voting power, citizens are incapable of controlling the elected branches’ power over their interests vis-à-vis social goods and services. They do not dictate the content of social welfare legislation, they do not decide what is and is not included in the budget and they do not control the administrative action through which the legislation is implemented. As a result, citizens are vulnerable to abuses of the elected branches’ power.

Finally, the beneficiary’s interests must be “capable of forming the subject matter of a fiduciary obligation”.⁷⁴ The fiduciary relationship has trust at its core.⁷⁵ As Fox-Decent has explained, the fiduciary concept was “born of a rich and complex legal history animated by a concern to protect the integrity of relations of trust”.⁷⁶ But for Fox-Decent, in contrast to how the social science literature has conceptualized it, trust is a presumptive concept: that is, the fiduciary exercises his power “on the basis of the beneficiary’s trust” regardless of whether the beneficiary does anything to repose trust in him.⁷⁷ Thus, Fox-Decent has argued that in the state-subject relationship, trust is both the basis for the state’s authority over its subjects and its duty to them. As he has summarized, the law, via the fiduciary principle, “entrusts the state to establish legal order on behalf of the people”; and the state, in turn, “exercises power on the basis of the people’s trust . . . precisely because the fiduciary principle has entrusted the state with public powers on their behalf”.⁷⁸ The same reasoning may be applied to the citizen-government relationship. Regardless of citizens’ actual trust in the elected branches with respect to social rights, the fiduciary principle entrusts them with the above power on citizens’ behalf; and the elected branches exercise their power on the basis of citizens’ trust. The citizen-government relationship thus satisfies the fiduciary relationship’s third condition.

73. *Ibid* at 111.

74. *Ibid* at 93–94.

75. See Leib, Ponet & Serota, “Fiduciary Theory of Judging”, *supra* note 63 at 706–07 (identifying trust as the third indicium of a fiduciary relationship).

76. Fox-Decent, *Sovereignty’s Promise*, *supra* note 63 at 30.

77. *Ibid* at 105.

78. *Ibid* at 106.

Now, in the private law context, fiduciary law scholars have argued, perhaps not so surprisingly, that the law regulating the relationship between fiduciaries and their principals should centre on trust.⁷⁹ Seeing as fiduciary relationships have trust at their core, fiduciary law, in essence, “regulates relationships that are based on reasonable trust”.⁸⁰ And thus, so the argument goes, it makes sense that fiduciary law should centre on trust. In the most recent and clearest example of this argument, Matthew Harding has claimed that given the centrality of trust to the fiduciary relationship, fiduciary law ought to be aimed at facilitating trusting relationships between fiduciaries and principals. In his words, “a main purpose of fiduciary law [ought to be] to enable such relationships to form, persist and deepen in ways that generate the instrumental . . . value” of such relationships.⁸¹ For Harding, fiduciary law can achieve this purpose by providing principals with “guarantees that the conduct of the fiduciaries will be consistent with the requirements of trustworthiness”.⁸² In other words, owing to fiduciary law, a principal in a fiduciary relationship can expect the fiduciary to act trustworthily and so, can trust him with respect to the property or power in their relationship.

If we apply the above reasoning to the citizen-government relationship, it follows that social rights enforcement should centre on political trust. Why? Given that social rights enforcement is the means by which courts oversee the citizen-government relationship, its governing law (social rights law) regulates that relationship. And based on the above reasoning—that the law regulating fiduciary relationships should centre on trust—it follows that social rights law—as law regulating a fiduciary relationship (the citizen-government relationship)—should centre on political trust. Simply, social rights law should be aimed at facilitating trust between citizens and the elected branches with respect to social rights so as to “generate the instrumental . . . value” of citizen trust in the citizen-government relationship.⁸³

79. See Tamar Frankel, “Fiduciary Law” (1983) 71:3 Cal L Rev 795; Joshua Getzler, “‘As If’ Accountability and Counterfactual Trust” (2011) 91:3 BUL Rev 973; Harding, “Trust and Fiduciary Law”, *supra* note 1.

80. Tamar Frankel, “Fiduciary Law in the Twenty-First Century” (2011) 91:3 BUL Rev 1289 at 1291.

81. Harding, “Trust and Fiduciary Law”, *supra* note 1 at 97.

82. *Ibid* at 95.

83. *Ibid* at 97.

Granted, I recognize the dangers of extending private law principles to a public law context (given their differences both in purpose and application).⁸⁴ But I should point out that in characterizing the citizen-government relationship as a fiduciary relationship, I do not adopt a “literalist” approach to public fiduciary theorizing.⁸⁵ That is, I am not suggesting that the elected branches’ duties to citizens are literally identical to those of a trustee in the private law context.⁸⁶ And in arguing that social rights enforcement should centre on political trust, I am not advocating transplantation of private law doctrine to public law. I am suggesting, rather, as Fox-Decent has phrased it, that “the principles relevant to acting on behalf of another in private law might help illuminate” this public law context.⁸⁷ Thus, to be sure, we need to exercise “caution when considering the application of fiduciary concepts to public law” (and fiduciary duties in a public law context will assume a different form).⁸⁸ But I do think that the above broad reasoning can be justifiably extended to the social rights context in light of the fact that the fiduciary political theory literature has, like the private law literature, recognized trust’s centrality to fiduciary relationships. For example, recall that for Fox-Decent, trust is the basis for the state’s authority over its subjects as well as its duty to them: their trust authorizes the state to act on their behalf and, in turn, the state must act on the basis of that trust. Given that literature’s recognition of the key role trust plays in fiduciary relationships, I do not think that the above reasoning is misplaced in the social rights context.

Further, my suggestion in this regard finds support in an argument which Paul Finn has made. Finn—who may be included in the camp of fiduciary

84. See Davis, *supra* note 64 at 1198–206; Endicott, *supra* note 64 at 375. For example, Timothy Endicott has noted that in the administrative law context, the role of the fiduciary has “deeply significant differences” from the role of administrative agencies in general and the role of judges in enforcing the fiduciary duties of trustees is different from their role in reviewing the lawfulness of administrative decision making (*ibid* at 375).

85. See Fox-Decent, “Challenges to Public Fiduciary Theory”, *supra* note 64. The “literalist” terminology has been used by Stephen Galoob and Ethan Leib. See Stephen R Galoob & Ethan J Leib, “The Core of Fiduciary Political Theory” in Smith & Gold, *supra* note 64, 401.

86. I am thus not making an argument like that which the Supreme Court of Canada considered (and rejected) in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24.

87. Fox-Decent, “Challenges to Public Fiduciary Theory”, *supra* note 64 at 382, n 21.

88. *Ibid* at 400.

political theory scholars—has argued that we may fairly characterize government as a trust (and so, characterize government actors as trustees for the people).⁸⁹ To support his argument, Finn has advanced three propositions: (a) that “[s]overeign power resides in the people”; (b) that where the public’s power is entrusted to others for the purposes of civil governance, the relevant actors are trustees for the people; and (c) that those “entrusted with public power are accountable to the public for the exercise of their trust”.⁹⁰ As part of his argument, and importantly for my purpose, Finn has contended that the people—in virtue of their sovereignty—are entitled to have certain expectations about the manner of their governing.⁹¹ And such expectations may ground corresponding duties on government actors. One key expectation is what Finn has called the “integrity principle”. It necessitates that “government is structured and practised in ways that invite and retain public trust in government itself”.⁹² In other words, the people are entitled to expect that government actors—as trustees for the people—will exercise public power in a trustworthy manner; and government actors may have a corresponding duty to exercise the power which has been entrusted to them trustworthily.⁹³ Hence, in light of Finn’s work in this regard, there is precedent in the public law literature for the idea that political trust can and should be used as the basis for a government’s obligations to its citizens.

89. See Paul Finn, “Public Trust and Public Accountability” (1994) 3:2 Griffith L Rev 224 [Finn, “Public Trust”]; Paul Finn, “A Sovereign People, A Public Trust” in PD Finn, ed, *Essays on Law and Government: Principles and Values*, vol 1 (Sydney: Law Book Company, 1995) 1 [Finn, “A Sovereign People”].

90. Finn, “Public Trust”, *supra* note 89 at 227–28.

91. See Finn, “A Sovereign People”, *supra* note 89 at 22.

92. *Ibid* at 27.

93. In recent work, Finn has suggested that “we should be slow to embrace” such trust or fiduciary principles “so as to channel and control official decision making” (including judicial review), in large part owing to the fact that, in Finn’s view, they are unlikely to “provide workable criteria upon which to found judicial review of official decision making”. Paul Finn, “Public Trusts, Public Fiduciaries” (2010) 38:3 FLR 335 at 335–36. However, I disagree with Finn in this regard; I suggest that my conceptualization of trust in this article does provide—at least the beginnings of—such workable criteria.

C. A Practical Justification

The final justification which I put forward for why political trust offers a promising basis for a social rights enforcement framework is of a practical nature. In their enforcement of constitutional social rights, there are two errors or “wrongs” which courts can make.⁹⁴ The first is “judicial abdication” and it “occurs when the judiciary declines to protect constitutional rights”, thereby abdicating its role as protector and enforcer of constitutional rights.⁹⁵ For example, a court abdicates its role in this regard where it shows too much deference to the elected branches in enforcing social rights.⁹⁶ The second, “judicial usurpation”, “occurs when the judiciary interprets and applies [social] rights in such a manner that it assumes control of the political system, crowding out . . . the democratically elected branches”.⁹⁷ Essentially, the courts usurp the policy-making role of the elected branches.

A fear of judicial usurpation underlay much of the first wave (justiciability) debate in the social rights enforcement conversation. Usurpation was feared because it was assumed that judicial review had to take on a “strong form”, with courts, in enforcing social rights, overruling the decisions and actions of the elected branches. And this is problematic given courts’ limited legitimacy and capacity in this area. But it is now generally recognized that courts can enforce social rights without usurping the elected branches’ policy-making role. And so, scholarly contributions to the second wave debate have advocated weaker forms of judicial review.⁹⁸ These weaker forms make it unnecessary for courts to make the hapless choice between usurpation and abdication; instead they may opt for a middle ground.⁹⁹

94. See Katharine G Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012) at 134.

95. *Ibid.*

96. Matthias Klatt, “Positive Rights: Who Decides? Judicial Review in Balance” (2015) 13:2 *Intl J Constitutional L* 354 at 361.

97. Young, *supra* note 94 at 134. See also Klatt, *supra* note 96 at 361.

98. See e.g. Dixon, *supra* note 11; Klein, *supra* note 12; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008); Young, *supra* note 94.

99. See Klatt, *supra* note 96 at 361–62; Young, *supra* note 94 at 34. See also King, *supra* note 8 at 8–10.

I suggest that a social rights enforcement framework based on the concept of political trust can similarly strike a good middle ground between these two wrongs. And it can do so because of the procedural orientation of trust (that is, as it has been conceptualized in the social science literature). Trust has commonly been conceptualized as a set of expectations held by the truster regarding the trustee's behaviour.¹⁰⁰ This set of expectations may be divided into three categories: (a) an expectation that the trustee will exercise goodwill toward the truster in exercising the control he maintains over the good or service at issue (an "expectation of goodwill"); (b) an expectation that the trustee has the competence to fulfill his role—i.e., to exercise his control in a competent manner (an "expectation of competence"); and (c) in fiduciary relationships, an expectation that the trustee will fulfill the fiduciary responsibility which he owes to the truster (an "expectation of fiduciary responsibility").¹⁰¹

First is the truster's expectation that the trustee will exercise goodwill toward her. This expectation has been characterized differently by different writers on trust.¹⁰² I think that it may be summed up as an expectation that the

100. See Jack Barbalet, "A Characterization of Trust, and Its Consequences" (2009) 38:4 *Theory & Society* 367 at 371–72; Barber, *supra* note 18 at 15–21; John Dunn, "Trust and Political Agency" in Diego Gambetta, ed, *Trust: Making and Breaking Cooperative Relations* (Oxford: Basil Blackwell, 1988) 73 at 74 [Gambetta, *Trust: Making and Breaking*]; Farrell, *supra* note 18 at 128–29; Karen Jones, "Trust as an Affective Attitude" (1996) 107:1 *Ethics* 4 at 5–6; Niklas Luhmann, "Familiarity, Confidence, Trust: Problems and Alternatives" in Gambetta, *Trust: Making and Breaking*, *supra* note 100, 94 at 97.

101. This conceptualization of trust is cognitive in nature. However, there are also affective and behavioural components to trust (which this conceptualization does not cover). Moreover, as I elaborate later in the article, there is a competing conceptualization of trust in the literature which envisages trust as expectations held by the truster regarding the outcome of her interaction with the trustee. See e.g. Diego Gambetta, "Can We Trust Trust?" in Gambetta, *Trust: Making and Breaking*, *supra* note 100, 213 [Gambetta, "Can We Trust Trust?"]. For the reasons which I will outline, I do not accept this competing conceptualization.

102. For example, Karen Jones has focused on how the trustee will respond to his being trusted, describing it as an "expectation that, when the need arises, the one trusted will be directly and favorably moved by the thought that you are counting on her". Jones, *supra* note 100 at 5–6. For John Dunn, it is an "expectation of benign intentions in another free agent" thereby emphasizing a lack of ill will on the part of the trustee. Dunn, *supra* note 100 at 74. Bernard Barber's account makes the expectation extremely broad, characterizing it as an "expectation of the persistence and fulfillment of the natural and the moral social orders" where those orders encompass an expectation that one will exercise goodwill toward another in the absence of reasons to the contrary. Barber, *supra* note 18 at 9.

trustee has good motives and that he will act in accordance with those good motives in exercising his control over the good or service.

The second expectation of which trust is comprised is an expectation held by the truster that the trustee has the technical competence (i.e., the knowledge and skills) to fulfill his role and thus, to exercise his control over the good or service.¹⁰³ This expectation necessarily supplements the expectation of goodwill because as Karen Jones has justifiably pointed out, “optimism about goodwill is not sufficient, for some people have very good wills but very little competence, and the incompetent deserve our trust almost as little as the malicious”.¹⁰⁴ The trustee’s competence may come from a number of sources, including expert knowledge, technical facility or daily routine performance.¹⁰⁵ Competence helps explain in part why trust involves a three-part relationship revolving around a good or service (X). Although we may expect that one has the competence to deal with one good or service, this expectation does not necessarily carry over to a different good or service. Where X changes, the truster’s expectations of the trustee’s competence may change and, in turn, the extent to which the truster trusts the trustee with respect to the new X in their relationship may also change.

In addition to the expectations of goodwill and competence which apply universally, in fiduciary relationships, trust is also comprised of a third expectation. This expectation finds its roots in the work of Bernard Barber. According to Barber, because there are cases where the truster may not be able to comprehend the trustee’s technical competence, society instills a moral sense of fiduciary responsibility in those who possess special knowledge and skills (and following from that, wield power).¹⁰⁶ As he has pointed out, we can only monitor competent performance from these individuals and institutions “insofar as it is based on shared knowledge and expertise”.¹⁰⁷ Where the trustee’s knowledge and expertise are not shared by the truster, something more is necessary. Fiduciary responsibility is that something more. Accordingly, trust by way of the fiduciary expectation is “a social mechanism that makes possible

103. See Barber, *supra* note 18 at 9.

104. Jones, *supra* note 100 at 6–7.

105. See Barber, *supra* note 18 at 9.

106. See *ibid* at 15.

107. *Ibid* at 15.

the effective and just use of the power that knowledge and position give and forestalls abuses of that power”.¹⁰⁸ The expectation is that the fiduciary will fulfill the responsibility which society has instilled in him. And that responsibility is, as Barber has put it, “to demonstrate a special concern for others’ interests above [the fiduciary’s] own”.¹⁰⁹

A social rights enforcement framework based on political trust would, generally speaking, have the courts enforce the above three expectations in the citizen-government relationship. These expectations amount to, in the broadest of terms: (a) that the elected branches will exercise goodwill toward citizens in their exercise of control over social goods and services; (b) that the elected branches have the requisite competence to exercise said control; and (c) given my earlier argument that the citizen-government relationship is a fiduciary relationship, that the elected branches will fulfill their fiduciary responsibility to citizens in exercising said control. Such enforcement would involve two interrelated forms of judicial intervention in social rights cases. First, courts would use these three expectations to *ex ante* define the elected branches’ obligations to citizens in exercising their control over social goods and services. That is, courts would explicitly set out these obligations in their judgments (generally and as they play out in particular areas of social welfare) so that both the elected branches and citizens know what their obligations and entitlements, respectively, are. Second, courts would hold the elected branches accountable where they fail to fulfill those obligations. Put simply, the courts would be responsible for reviewing the elected branches’ social welfare legislation and executive action vis-à-vis social welfare. The criteria or standards against which that legislation and executive action are evaluated would be derived from the above three expectations of trust. And where the elected branches fail to comply with those three expectations, they would be censured and sanctioned by the courts.

Now, importantly, the three expectations described above regard the manner in which the trustee exercises his control over the good or service—in other words, the *procedure* by which that exercise of control takes place. They do not regard the *outcome* of the truster’s interaction with the trustee.¹¹⁰ Consequently,

108. *Ibid.*

109. *Ibid.* at 14.

110. While there is a competing conceptualization of trust in the social science literature which focuses on the outcome of the truster’s interaction with the trustee, I do not accept

a political trust-based framework for enforcing social rights would have the courts principally reviewing the procedure by which the elected branches exercise their control over social goods and services (rather than the outcome of their decision making).¹¹¹ In other words, given trust's procedural orientation, the courts, in applying a political trust-based framework, would not be defining the substance of social policy so as to usurp the elected branches' policy-making role. However, the courts would be ensuring that the procedure followed by the elected branches in developing and implementing social policy evinces goodwill, competence and fulfillment of its fiduciary responsibility to citizens. And in so doing, they could still, I suggest, play a meaningful role in social rights protection so as to not abdicate their constitutional role as protector and enforcer of rights.¹¹² Granted, procedural approaches to social rights enforcement have been the subject of much criticism. Such criticism has been, in large part, in response to the "reasonableness" approach adopted by the Constitutional Court of South Africa in interpreting and applying

that conceptualization. See James G March & Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989) at 27; Oliver E Williamson, "Calculativeness, Trust, and Economic Organization" (1993) 36:1 *JL & Econ* 453. Also, I do not accept an outcome-centred conceptualization of trust because empirical evidence has shown that citizens' assessments of government legitimacy—and the cooperation which follows from it—are much more influenced by citizens' judgments of the procedure by which government actors make decisions than by the outcome of their decision making. See John R Hibbing & Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs About How Government Should Work* (Cambridge, UK: Cambridge University Press, 2002); Tom R Tyler & Peter Degoey, "Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions" in Roderick M Kramer & Tom R Tyler, eds, *Trust in Organizations: Frontiers of Theory and Research* (Thousand Oaks, Cal: Sage Publications, 1996) 331. Seeing as the principal basis for political trust's value to contemporary democracies is citizen cooperation with government actors (and this, in turn, underlies my instrumental justification), I suggest that it is better to conceptualize trust in terms of the three expectations outlined here (which are procedural and whose connection with citizen cooperation finds strong empirical support).

111. I say "principally" because, as I explain later, some elements of political trust (as I translate them in the specific context of social rights) are more substantive in nature.

112. In this regard, a political trust-based enforcement framework finds parallels in other procedural approaches to social rights enforcement. See Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont, S Afr: Juta & Co, 2010) at 120–30 [Liebenberg, *Socio-Economic Rights*]; Brian Ray, "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9:3 *Washington Global Studies L Rev* 399; Brian Ray, "Proceduralisation's Triumph and Engagement's Promise in Socio-Economic

its constitution's social rights provisions (which scholars have interpreted as significantly procedural in nature).¹¹³ The principal concerns that have been raised by scholars in this camp are that procedural approaches (like reasonableness): (a) fail to set standards or lay down principles which can guide future policy-making (as well as aid courts in future social rights cases); and (b) they have limited practical effect in that they do little to protect vulnerable groups (and following from this, they may discourage litigation). These concerns are valid. However, I think that a political trust-based framework for enforcing social rights, while principally procedural, would mitigate these two concerns to a significant degree.

On the first concern, we know that a political trust-based framework would have courts use trust's three expectations to *ex ante* define the elected branches' obligations to citizens. Consequently, unlike many procedural approaches (including reasonableness), it *would* set standards and lay down principles, both to guide future policy-making and for courts in future cases: those standards and principles stemming from the expectations of trust.

Further, I submit that such a framework would mitigate the concern of procedural approaches having limited practical effect. Why? By using trust's expectations to *ex ante* define the elected branches' obligations, courts would promote what Brian Ray has termed the "institutionalisation" of procedural

Rights Litigation" (2011) 27:2 SAJHR 107 [Ray, "Proceduralisation's Triumph"]; Brian Ray, *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (Cambridge, UK: Cambridge University Press, 2016).

113. See David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 119:3 SALJ 484; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007) at 136–76; Danie Brand, "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in Henk Botha, André van der Walt & Johan van der Walt, eds, *Rights and Democracy in a Transformative Constitution* (Stellenbosch, S Afr: Sun Press, 2003) 33; Marius Pieterse, "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services" (2006) 22:3 SAJHR 473; Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited" (2007) 29:3 Hum Rts Q 796. There have also been more recent criticisms aimed at the "proceduralisation" of social rights in terms of the Court's adoption of engagement as an enforcement tool in social rights cases. See e.g. Kirsty McLean, "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*" (2010) 3 Constitutional Court Rev 223.

remedies. In his work, Ray has argued that engagement (a procedural remedy introduced by the Constitutional Court of South Africa which obliges governments to engage meaningfully with affected communities on social welfare matters) “can give poor people and their advocates an important . . . enforcement tool”.¹¹⁴ But to do so, engagement must be institutionalized. For Ray, institutionalization requires governments to adopt measures which “ensure systematic implementation of engagement” such that they “work to develop a more generalised capacity for engagement outside of specific projects”.¹¹⁵

In parallel to Ray’s argument vis-à-vis engagement, I suggest that the expectations of trust—if institutionalized in the elected branches’ exercise of control over social goods and services—could do a lot to protect vulnerable groups. That protection will become clearer shortly once I conceptualize political trust in the social rights context. But generally, they would promote government goodwill, competence and fulfillment of fiduciary responsibility. And a political trust-based framework would encourage the institutionalization of these expectations because, again, courts would use them to *ex ante* define the elected branches’ obligations. Put simply, the expectations would not only serve as an accountability measure (used by courts on an ad hoc basis to review resource allocation decisions), but the elected branches would be expected to develop and implement social policy broadly in compliance with those expectations (with failure to comply giving rise to court intervention). A political trust-based framework would thus promote those expectations’ systematic implementation in the elected branches’ overall exercise of control over social goods and services.

III. Conceptualizing Political Trust in the Social Rights Context

Having justified in Part II why political trust offers a promising basis for a social rights enforcement framework, I will now use this final part of the article to explain in further detail what it means for citizens to “trust” the elected branches with respect to social rights. In other words, I will elaborate upon what the three expectations of trust translate into in the specific context of social

114. Ray, “Proceduralisation’s Triumph”, *supra* note 112 at 109.

115. *Ibid* at 117.

rights. This elaboration is necessary because, as scholars generally agree, trust is a context-specific concept.¹¹⁶ Put simply, what trust means in one context may not necessarily hold in another. Importantly, my elaboration here will provide us with some insight into what a political trust-based framework for enforcing social rights would entail.

A. The Expectation of Goodwill

I contend that in the citizen-government relationship, the first constituent expectation of trust—that of goodwill—translates into a pair of interrelated sub-expectations.

The first sub-expectation is that those who staff the elected branches will not act in bad faith.¹¹⁷ What does bad faith in the social rights context denote? Kent Roach and Geoff Budlender have outlined a typology of three reasons for why governments fail to comply with social rights.¹¹⁸ The first is inattentiveness and refers to those circumstances in which government actors make unintentional oversights or, as is more commonly the case, they fail to appreciate the nature of their constitutional obligations.¹¹⁹ The second, incompetence, captures those cases of government non-compliance that are due to incapacity or, in the words of Roach and Budlender, the product of “decades of neglect, inadequate budgets and inadequate training of public officials”.¹²⁰ And finally, and of note here, there is intransigence which covers those situations in which government actors understand their constitutional obligations and have the capacity to

116. See Barber, *supra* note 18 at 16–17; Gambetta, “Can We Trust Trust?”, *supra* note 101 at 219; Holton, *supra* note 17 at 67; Hardin, “Conceptions and Explanations of Trust”, *supra* note 17 at 9; Harding “Manifesting Trust”, *supra* note 1 at 246; Jones, *supra* note 100 at 5.

117. See Dunn, *supra* note 100 at 74, 89–90.

118. See Kent Roach & Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?” (2005) 122:2 SALJ 325. For the work from which Roach and Budlender’s typology was adapted, see Chris Hansen, “Making It Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies” in S Randall Humm et al, eds, *Child, Parent, and State: Law and Policy Reader* (Philadelphia: Temple University Press, 1994) 224.

119. See Roach & Budlender, *supra* note 118 at 346, n 95.

120. *Ibid* at 349 (conceptualizing incompetence in a slightly different way than I do).

meet them, yet they refuse to do so.¹²¹ In my view, the first sub-expectation of goodwill is captured by Roach and Budlender's intransigence concept. It is an expectation that the elected branches will not act "intransigently" in exercising their control over social goods and services. Where the elected branches (or more accurately their staff) understand their obligations to citizens and are able to meet those obligations—but they choose not to—the elected branches exercise their control in bad faith.

The second sub-expectation, which I suggest is encompassed by goodwill, is that the elected branches, in exercising their control over social goods and services, will employ fair procedures. This sub-expectation follows from the first. To use Joel Brockner and Phyllis Siegel's words: "The fairness of procedures says a lot about whether the [trustee's] 'heart is in the right place.' Fair procedures signify that the [trustee] 'means well,' that is, [he] appears to want to live up to [his] commitments."¹²² Now, given the breadth of "fair procedures", it is beyond the scope of this article to offer a comprehensive definition of the notion in the social rights context. That said, I would like to provide at least some minimal elaboration of it here.

In debating the parameters of procedural fairness, scholars have identified a lengthy list of elements which they say (often supported by empirical evidence) contribute to people's assessments of procedural fairness.¹²³ Undoubtedly, these elements carry different weight depending on context.¹²⁴ Thus, in what follows, I will outline three elements from this literature which I regard as carrying particular weight in the social rights context. But first, a point of clarification.

121. See Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Oxford: Hart, 2014) at 210, citing Roach & Budlender, *supra* note 118.

122. Joel Brockner & Phyllis Siegel, "Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust" in Kramer & Tyler, *supra* note 110, 390 at 407.

123. For a representative sample, see Gerald S Leventhal, "What Should be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships" in Kenneth J Gergen, Martin S Greenberg & Richard H Willis, eds, *Social Exchange: Advances in Theory and Research* (New York: Plenum Press, 1980) 27; Tom R Tyler, "What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22:1 *Law & Soc'y Rev* 103; Tom R Tyler, "Social Justice: Outcome and Procedure" (2000) 35:2 *Intl J Psychology* 117 [Tyler, "Social Justice"].

124. See Leventhal, *supra* note 123 at 39.

Since I have conceptualized political trust as a set of expectations held by citizens, it seems reasonable that the fairness of procedures would also be judged from citizens' perspective. In other words, fairness is defined by what citizens would reasonably be expected to consider fair. With that clarification made, I turn to the three fairness elements.

The first element, which I submit carries particular weight in the social rights context, is transparency: for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, it must be transparent.¹²⁵ A transparent process enables citizens to see how the elected branches are exercising their control over social goods and services and to know whether, in that process, the actors who staff those branches are indeed acting with goodwill (not to mention acting in accordance with the other two expectations of trust). Linking transparency directly to citizen trust, Karen Cook, Russell Hardin and Margaret Levi have noted that because “[p]ower is often correlated with lack of transparency and secrecy”, those in political power are more likely to be perceived as trustworthy if they employ “a decisionmaking process that is transparent enough to those dependent on them to reveal clearly that their actions are in the best interest of those over whom they have power”.¹²⁶ In the social rights context, such transparency is especially important because, as one commentator has put it, the “welfare state presents itself to the public as an extraordinar[ily] complex, diversified and unintelligible institutional

125. See Margaret Levi, Audrey Sacks & Tom Tyler, “Conceptualizing Legitimacy, Measuring Legitimizing Beliefs” (2009) 53:3 *American Behavioral Scientist* 354 at 360; Rebecca Hollander-Blumoff & Tom R Tyler, “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” [2011] *J Disp Resol* 1 at 5 (includes transparency under the overarching procedural fairness element of “neutrality”). In addition, scholars have emphasized the importance of transparency in the social rights context. See Colleen M Flood, “Just Medicare: The Role of Canadian Courts in Determining Health Care Rights and Access” (2005) 33:4 *JL Med & Ethics* 669; Donna Greschner & Steven Lewis, “*Auton* and Evidence-Based Decision-Making: Medicare in the Courts”, Case Comment on *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, (2003) 82:2 *Can Bar Rev* 501; Martha Jackman, “Charter Review as a Health Care Accountability Mechanism in Canada” (2010) 18 *Health LJ* 1.

126. Cook, Hardin & Levi, *supra* note 56 at 56–57. See also Claus Offe, “How Can We Trust Our Fellow Citizens?” in Warren, *supra* note 18, 42 at 54.

arrangement”.¹²⁷ A transparent process signals to citizens that the elected branches have nothing to hide in this arrangement. In essence, transparency offers citizens good reason to expect goodwill to be exercised by the elected branches (as well as, again, the other two expectations of trust). This is because if the elected branches fail to meet citizens’ expectations, their failure will be on display for everyone to see.¹²⁸ Moreover, and relatedly, if a citizen wishes to challenge a governmental resource allocation decision, a transparent process equips that citizen with the information she needs to do so and, in turn, to hold the elected branches accountable.¹²⁹

The second element of procedural fairness, which I say is of considerable importance in the social rights context, is participation: for citizens to judge the elected branches’ process for exercising their control over social goods and services as fair, it must be participatory.¹³⁰ To use the concise words of Margaret Levi: “If a group perceives that its voice is systematically ignored, it will not accept the policy-making process as fair.”¹³¹ Importantly, Tom Tyler has found that while people feel more fairly treated if they are given opportunities “to participate in the resolution of their problems or conflicts by presenting their suggestions about what should be done”, such participation need not amount to control over outcome.¹³² People value the simple opportunity to share their views with decision makers even if those views have little to no influence on the

127. Trüdinger & Bollow, *supra* note 39 at 191, citing Karl Hinrichs, “Social Insurances and the Culture of Solidarity: The Moral Infrastructure of Interpersonal Redistributions - with Special Reference to the German Health Care System” (1997) Centre for Social Policy Research, University of Bremen Working Paper No 03/1997. See also O’Cinneide, *supra* note 8 at 404–05.

128. For Pierre Rosanvallon, transparency has “replace[d] the exercise of responsibility as the end of politics”. Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, translated by Arthur Goldhammer (Cambridge, UK: Cambridge University Press, 2008) at 258.

129. See Warren, “Democratic Theory and Trust”, *supra* note 61 at 338–39.

130. See Leventhal, *supra* note 123 at 43–46; Tyler, “Social Justice”, *supra* note 123 at 121–22. In addition, scholars have emphasized the importance of participation in the social rights context. See e.g. Fredman, *Human Rights Transformed*, *supra* note 5; Oliver Gerstenberg, “Negative/Positive Constitutionalism, ‘Fair Balance,’ and the Problem of Justiciability” (2012) 10:4 *Intl J Constitutional L* 904; King, *supra* note 8.

131. Levi, “Consent, Dissent and Patriotism”, *supra* note 37 at 24.

132. Tyler, “Social Justice”, *supra* note 123 at 121.

decisions made.¹³³ In fact, when it comes to political disputes, Tyler has found that not only do people not need control over outcomes, they do not want it: people expect government authorities to make those decisions for them.¹³⁴ However, people *do* need to feel that their views were sincerely considered by decision makers—that is, that their “voice” was heard by the relevant decision makers.¹³⁵ To quote Tyler, for participation to lead to “the evaluation of procedures as fairer”, people “must trust that the authority sincerely considered their argument, even if they were then rejected”.¹³⁶

Accordingly, I suggest that for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, citizens must be able to participate in that process. If a governmental decision in exercise of such control has particular impact on a specific group of citizens, procedural fairness requires that said group be able to express its views to the relevant government authority and that the latter, in turn, sincerely consider those views in making its decision. The government authority need not allow those views to dictate its ultimate decision, but it must sincerely consider the views.

The final element of procedural fairness, which I will point to as especially important in the social rights context, is respect for citizens’ rights: for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, their rights must be respected in that process.¹³⁷ For Tyler, this element falls under a larger fairness element which he has called “treatment with dignity and respect”.¹³⁸ He has found that people judge a procedure as fairer when they are treated with dignity and respect—and such treatment includes both “common respect and courtesy” as well as “respect for people’s rights”.¹³⁹ In Tyler’s words, “People value having respect shown for their rights and for their status within society. They are very concerned that, in

133. See *ibid* at 121–22.

134. See *ibid* at 122.

135. *Ibid* at 121.

136. *Ibid* at 122.

137. See Levi, Sacks & Tyler, *supra* note 125 at 360; Tyler, “Social Justice”, *supra* note 123 at 122.

138. Tyler, “Social Justice”, *supra* note 123 at 122.

139. Hollander-Blumoff & Tyler, *supra* note 125 at 6.

the process of dealing with authorities, their dignity as people and as members of society is recognized and acknowledged.”¹⁴⁰

Now, as Hollander-Blumoff and Tyler have pointed out, respect for citizens’ rights encompasses both human rights as well as legal process rights (e.g., standing to bring a legal case).¹⁴¹ And therefore, procedural fairness requires that the elected branches respect all of these rights in exercising their control over social goods and services. That said, I would like to stress one particular right here: citizens’ (human) right to equality.¹⁴² Why? As many scholars have emphasized, the right to equality is closely related to social rights.¹⁴³ And following from this relationship, we should—in addressing the enforcement of social rights—also consider equality. Accordingly, this brings me to a question: if procedural fairness in the social rights context requires that the elected branches respect citizens’ rights—including, importantly, their right to equality—what does it mean for the elected branches to respect citizens’ right to equality?

Under a formal approach to equality, it means that the elected branches will, in exercising their control over social goods and services, treat all citizens alike. But the equality literature makes very clear that the formal approach suffers from several problems, including, of note, its perverse capability of “disallowing [governmental] measures aimed at actually promoting equality”.¹⁴⁴

140. Tyler, “Social Justice”, *supra* note 123 at 122.

141. See Hollander-Blumoff & Tyler, *supra* note 125 at 6.

142. I am assuming that the right to equality is, like social rights, constitutionally protected.

143. See Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14:1 CJWL 185; Sandra Fredman, “Redistribution and Recognition: Reconciling Inequalities” (2007) 23:2 SAJHR 214 [Fredman, “Redistribution and Recognition”]; Fredman, *Human Rights Transformed*, *supra* note 5; Sandra Liebenberg, “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21:1 SAJHR 1; Liebenberg, *Socio-Economic Rights*, *supra* note 112; Sandra Liebenberg & Beth Goldblatt, “The Interrelationship Between Equality and Socio-Economic Rights Under South Africa’s Transformative Constitution” (2007) 23:2 SAJHR 335; Murray Wesson, “Equality and Social Rights: An Exploration in Light of the South African Constitution” (2007) Public L 748 [Wesson, “Equality and Social Rights”]; Murray Wesson, “Discrimination Law and Social Rights: Intersections and Possibilities” (2007) 13 *Juridica Intl* 74; David Wiseman, “The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?” (2015) 71 *SCLR* (2nd) 563. However, these scholars have different perspectives on the precise nature of the relationship between these sets of rights.

144. Wesson, “Equality and Social Rights”, *supra* note 143 at 751. See Fredman, “Redistribution and Recognition”, *supra* note 143 at 216.

For that reason, I submit that respect for citizens' right to equality cannot reasonably connote protection of formal equality. Rather, in line with what is the overwhelmingly dominant view in the literature (as well as the position adopted by some courts), I submit that equality in this regard means substantive equality.¹⁴⁵ And consequently, for the elected branches to respect citizens' right to equality in their exercise of control over social goods and services, they must exercise it in furtherance of substantive equality.

Unlike formal equality (which focuses on differential treatment in law, seeking to eliminate such differential treatment), substantive equality's focus is on "patterns of group-based disadvantage" which give rise to structural inequality.¹⁴⁶ It recognizes that "equality cannot be achieved by adopting a merely negative or 'hands-off' approach"; and hence, it acknowledges the need for positive governmental measures which address that group's disadvantaged position.¹⁴⁷ In view of that, substantive equality is said to "[transcend] formal equality at the point where it demands differential legal treatment in order to ameliorate and overcome inequalities".¹⁴⁸ While there is much agreement in the equality literature in favour of a substantive (rather than formal) approach to equality, there is disagreement as to the overarching objectives of such an approach: that is, they agree that equality demands positive governmental measures but disagree over what is to be equalized in introducing such positive measures.¹⁴⁹ Sandra Fredman, in her influential work in the area, has argued that substantive equality "resists capture by a single principle".¹⁵⁰ According to her, substantive equality is, rather, a multi-dimensional concept.¹⁵¹ And drawing

145. For examples of cases supporting a substantive equality approach, see *R v Kapp*, 2008 SCC 41; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, [1998] ZACC 15.

146. Liebenberg & Goldblatt, *supra* note 143 at 342–43.

147. Brodsky & Day, *supra* note 143 at 207. See also Wiseman, *supra* note 143 at 564.

148. Wiseman, *supra* note 143 at 564.

149. Two of the best-known objectives in this regard are equality of opportunity and equality of results. See Sandra Fredman, "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21:2 SAJHR 163 at 167 [Fredman, "Providing Equality"].

150. Sandra Fredman, "Substantive Equality Revisited" (2016) 14:3 Intl J Constitutional L 712 at 713 [Fredman, "Substantive Equality Revisited"].

151. See Fredman, "Redistribution and Recognition", *supra* note 143 at 225–27. See also Fredman, *Human Rights Transformed*, *supra* note 5 at 179.

on the strengths of various principles in the substantive equality discourse, Fredman has identified four objectives for the concept: (a) to promote respect for the equal dignity and worth of all (including to redress stigma, stereotyping, humiliation and violence); (b) to accommodate, affirm and celebrate identity within a community; (c) to break the cycle of disadvantage which is associated with out-group membership; and (d) to facilitate full participation in society.¹⁵² For Fredman, these objectives—or dimensions—interact and have synergies with one another; and therefore, we can, and we should, consider how the “dimensions might be used to buttress one another”.¹⁵³

I agree with Fredman’s conceptualization. It recognizes the complexity of inequality, locating the right to equality, as Fredman has noted, in its “social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored”.¹⁵⁴ Hence, adopting this multi-dimensional conceptualization of substantive equality for the purpose of conceptualizing trust in the citizen-government relationship, I contend that for the elected branches to exercise their control over social goods and services in furtherance of substantive equality, they must strive to implement measures which achieve the above objectives. And given the procedural fairness requirement that citizens’ rights (including equality) be respected, the elected branches must so strive for the process by which they exercise control to be judged as fair.¹⁵⁵

Now, granted, because I am adopting a substantive conception of equality, a political trust-based framework for enforcing social rights cannot be fairly described as entirely procedural.¹⁵⁶ And therefore, this element of procedural fairness presents some complications for the framework (specifically for my earlier argument that the framework is capable of striking a good middle

152. As substantive equality includes a participation component in objective (d), there will be overlap between this element of procedural fairness and the participation element of procedural fairness.

153. Fredman, “Substantive Equality Revisited”, *supra* note 150 at 713.

154. *Ibid.*

155. I say “strive” because, as Sandra Liebenberg and Beth Goldblatt have recognized, substantive equality “contains a forward looking vision of a society where people are provided with the resources and the opportunities to develop, participate and flourish equally as human beings”. Liebenberg & Goldblatt, *supra* note 143 at 342–43.

156. To repeat, it is for this reason that I have described a trust-based framework as having courts *principally* reviewing the procedure by which the elected branches exercise their control over social goods and services.

ground between the two wrongs of enforcement owing to trust's procedural orientation). But this more substantive element, I suggest, does not preclude a political trust-based framework from nonetheless striking a good middle ground between the two wrongs of enforcement. On this point, a distinction can—and should—be drawn between, on the one hand, what equality signifies and, on the other, how courts should enforce the right to equality.¹⁵⁷ Human rights have roles and functions beyond the courts.¹⁵⁸

Recognizing this distinction, Fredman (despite advocating the above-outlined substantive conception of equality) has suggested that courts, given their limitations, should occupy a catalytic (rather than prescriptive) role in enforcing the right to equality. As she has emphasized, “the existence of a right does not mean that the court needs to make primary decisions about the allocation of resources”.¹⁵⁹ According to her, courts—rather than detract from democracy (which would be the case if they made primary decisions about resource allocation)—can and should enhance democracy by requiring decision makers to justify, in light of the equality principle, their decisions. Simply, they should require decision makers to “show that their choice of eligibility criteria” satisfies the four objectives of substantive equality such that their choice “not only redresses disadvantage, but also promotes respect and dignity, accommodates diverse identities, and facilitates participation or counters social exclusion”.¹⁶⁰ I agree with Fredman's view on the role of courts in enforcing the right to equality. Not only does it recognize the complexity of inequality, but it acknowledges the limited legitimacy and capacity of courts in making resource allocation decisions. As such, it neither strips equality of substance (in a way that a formal conception of equality would) nor yields judicial usurpation of the elected branches' policy-making role. So, if we incorporate Fredman's approach

157. See Fredman, *Human Rights Transformed*, *supra* note 5 at 183; Klatt, *supra* note 96 at 356.

158. Such roles and functions include “an expressive and educational role, signalling the values a society stands for, regardless of the method for their enforcement” as well as a “proactive function, guiding political and executive decision-making so that legislation, policy, and administration are formulated to meet human rights demands”. Fredman, *Human Rights Transformed*, *supra* note 5 at 32–33.

159. Fredman, “Providing Equality”, *supra* note 149 at 182.

160. Fredman, *Human Rights Transformed*, *supra* note 5 at 182.

into the otherwise procedural trust-based framework for enforcing social rights (as I think we can and we should), the resultant framework—though not entirely procedural—could still strike a good middle ground between the two wrongs of enforcement.

To sum up, I have suggested that in the citizen-government relationship, the goodwill expectation translates into two sub-expectations: one is that those who staff the elected branches will not act in bad faith toward citizens (i.e., will not act intransigently), and the other is that the elected branches will use fair procedures in exercising their control over social goods and services (including those which are transparent, participative and respectful of citizens' rights (including equality)). So, to say that citizens trust the elected branches with respect to social rights means, at least in part, that they expect such actions and procedures.

B. The Expectation of Fiduciary Responsibility

In the citizen-government relationship, the expectation of fiduciary responsibility is closely connected with the expectation of goodwill. For this reason, I will consider it next.

If we accept that the citizen-government relationship is indeed fiduciary in nature (as I argued in Part II), and following from this, that the expectation of fiduciary responsibility does apply to the relationship, this leaves the question: what precisely does the expectation of fiduciary responsibility involve?¹⁶¹ To repeat, this expectation is closely related to the expectation of goodwill. Both involve, broadly speaking, an expectation that the elected branches will act in citizens' interests; however, the expectation of fiduciary responsibility takes it a step further. At its core, it is an expectation that the elected branches, in exercising their control over social goods and services, will not allow their staff's interests to impact their decisions (thereby unfairly discounting or disregarding citizens', or a subset of citizens', interests). Fiduciary relationships are said to give rise to a number of duties or obligations on the part of the fiduciary, including:

161. The conclusion that the expectation of fiduciary responsibility applies to the citizen-government relationship also finds support in Barber's work. Barber has specifically recognized the application of this expectation to the relationship between the public and its leaders. See Barber, *supra* note 18 at 80–81. Thus, it is reasonable to think that Barber himself would have found that the expectation of fiduciary responsibility applies here.

loyalty, care, and in the public law context, fairness and reasonableness.¹⁶² The expectation of fiduciary responsibility is an expectation that these duties will be fulfilled. Again, it is beyond the scope of this article to offer an exhaustive analysis of each of these duties and to define precisely what they entail in the social rights context. However, as Fox-Decent has suggested, “the most fundamental and general fiduciary duty” (by which many of these duties are encompassed) is what he has described as “fidelity to the other-regarding purposes for which fiduciary power is held”.¹⁶³ As I noted earlier, on the basis of the beneficiary’s trust, the fiduciary is granted the power to act on the beneficiary’s behalf: that is, to pursue her interests. Hence, the fiduciary’s responsibility is to exercise said power for that specific purpose: he must pursue only the beneficiary’s interests.

In applying this duty to the citizen-government relationship, there are two issues which a reader may reasonably raise. The first relates to the identity of the beneficiary. In a political relationship, like the citizen-government relationship, the fiduciary has multiple beneficiaries (i.e., all citizens) whose interests are bound to conflict with one another (at least in some cases).¹⁶⁴ Thus, the fiduciary does not have one beneficiary whose singular set of interests he may pursue; accordingly, in fulfilling his duty, he is obliged to pursue multiple, competing interests which he must necessarily balance. However, as Fox-Decent has said, “there is nothing intrinsically wrong or unusual with office-holders having distinct and even conflicting duties to different classes of individuals”.¹⁶⁵ It introduces complications for sure; but those complications are not insuperable.¹⁶⁶ That said, the core fiduciary duty—fidelity to the other-regarding purposes of the fiduciary’s power—demands that while the fiduciary pursues these multiple, competing interests, he does not allow his own interests to interfere with the beneficiaries’ interests.¹⁶⁷ This brings me to the second

162. See Fox-Decent, *Sovereignty’s Promise*, *supra* note 63 at 34–37.

163. *Ibid* at 37; Fox-Decent, “Fiduciary Nature”, *supra* note 63 at 268.

164. See Fox-Decent, *Sovereignty’s Promise*, *supra* note 63 at 34.

165. Fox-Decent, “Challenges to Public Fiduciary Theory”, *supra* note 64 at 387.

166. Fox-Decent has noted the following in this regard: “The issue of how fiduciaries should reconcile competing mandates is under-theorized and likely to prove challenging. But the fact that there are concrete examples of fiduciaries who balance multiple charges on an ongoing basis suggests that close attention to practice should prove rewarding, and that the challenge is not insuperable.” *Ibid*.

167. See Fox-Decent, “Fiduciary Nature”, *supra* note 63 at 280. See also Leib, Ponet & Serota, “Fiduciary Theory of Judging”, *supra* note 63 at 712–13.

issue: do the elected branches, as fiduciaries of citizens, have interests? I would say not per se; however, those actors who staff the elected branches definitely do, which may conflict with citizens' (or a subset of citizens') interests and which may be furthered at their expense. These actors' core fiduciary duty, as staff of the elected branches, is to ensure that the latter does not happen.¹⁶⁸

I thus suggest that in the citizen-government relationship, the fiduciary responsibility expectation both rightfully applies and it amounts, at its core, to an expectation that the elected branches will exercise their control over social goods and services for other-regarding purposes—that is, the elected branches will pursue only the interests of citizens and not the interests of their staff. Hence, to say that citizens trust the elected branches with respect to social rights means, again in part, that the elected branches will act in this way.

C. The Expectation of Competence

Last, but certainly not least, trust in the citizen-government relationship entails an expectation of competence. In the citizen-government relationship, this expectation may be described, broadly speaking, as an expectation that the elected branches have the requisite competence to exercise their control over social goods and services and so, in turn, that they will exercise said control in a competent manner. But what exactly does that mean? In other words, what defines “competence” from the elected branches? How do they exercise their control over social goods and services in a “competent” manner? I suggest that in the citizen-government relationship, competence engages the idea of evidence-based policy-making (EBPM). In brief, it is my suggestion that the expectation of competence in the citizen-government relationship translates into an expectation that the elected branches will exercise their control over social goods and services in accordance with the principles of EBPM.

EBPM is a model aimed at the development and implementation of the most effective public policies and programs. It revolves around three forms of knowledge.¹⁶⁹ The first, and perhaps the most commonly associated with EBPM, is knowledge derived from scientific research. Under EBPM, policy-makers use

168. For further support of this conclusion, see Evan Fox-Decent & Evan J Criddle, “The Fiduciary Constitution of Human Rights” (2009) 15:4 *Leg Theory* 301 at 318.

169. See Brian W Head, “Three Lenses of Evidence-Based Policy” (2008) 67:1 *Australian J Public Administration* 1.

the best available research from the natural and social sciences in order to better understand and improve public policies and programs. However, as scholars have emphasized, under EBPM, scientific research is not, or at least should not be, determinative: in JA Muir Gray's words, with EBPM, "decisions are *based* on evidence and not *made by* evidence".¹⁷⁰ Therefore, EBPM necessitates a synthesis of knowledge from scientific research with other forms of knowledge.¹⁷¹ Brian Head has usefully categorized these other forms of knowledge into what he has called "political knowledge" and "practical implementation knowledge".¹⁷² Political knowledge—a form of knowledge which comes into play during the development stage for public policies and programs—refers to the "know-how, analysis and judgment of political actors".¹⁷³ It is a vast and varied form of knowledge indeed, including everything from persuasion and advocacy skills as well as the ability to build coalitions of support, to the capacity to negotiate trade-offs and compromises. Practical implementation knowledge—which instead comes into play during the public policy and program implementation stage—is knowledge relating to the management of social programs. It encapsulates what one needs to know in order to "wrestle with everyday problems of program implementation and client service".¹⁷⁴ Stemming from "the 'practical wisdom' of professionals in their 'communities of practice'", this form of knowledge assumes the form of government actors adopting a "best practice".¹⁷⁵

I suggest that these three forms of knowledge are what citizens would reasonably expect from competent government in its exercise of control over social goods and services. For political actors (members of the legislature, cabinet members), it is reasonable that political knowledge would be expected of such actors to be deemed competent in carrying out their responsibilities with respect to social goods and services (i.e., preparing, developing and

170. JA Muir Gray, "Evidence Based Policy Making: Is About Taking Decisions Based on Evidence and the Needs and Values of the Population" (2004) 329:7473 *Brit Med J* 988 at 988 [emphasis added].

171. See Ittai Bar-Siman-Tov, "The Dual Meaning of Evidence-Based Judicial Review of Legislation" (2016) 4:2 *Theory & Practice Legislation* 107 at 110.

172. Head, *supra* note 169 at 5–6.

173. *Ibid* at 5.

174. *Ibid* at 6.

175. *Ibid* at 6–7.

promulgating primary legislation, as well as preparing and approving the budget). And by the same token, practical implementation knowledge would be reasonably expected of administrative decision makers in competently carrying out their responsibilities in implementing social programs. Moreover, it is also reasonable that a competent government would be expected to possess the kind of knowledge from scientific research which EBPM demands. In exercising their control over social goods and services, the elected branches make decisions—including which social goods and services to fund and deliver, how much money to invest in a social program, and who will and will not be covered by that program—in order to serve certain policy ends. Scientific research, by offering insights into which policy initiatives are the most effective to achieve those ends, is therefore of critical value. Accordingly, I submit that competent decisions in this regard should be made on the basis of the best research available. Further, this suggestion follows from my earlier discussion of competence. As I explained there, a trustee's competence may come from a number of sources, including expert knowledge. Now, granted, the elected branches' staff cannot be experts in all fields and sub-fields of social welfare. But surely it is reasonable that where a trustee does not possess the requisite knowledge and skills himself (as the elected branches may not), competence demands that he make good faith efforts to seek out those who do. In such cases, the source of the trustee's competence is, rather than his own knowledge and skills, those of another actor (and the research which that actor produces); and so, whether the trustee is indeed competent will depend on the competence of the actor upon whom he relies. Hence, to be truly competent, the trustee must make good faith efforts to seek out the most competent actor and so, the best available evidence from research.

In sum, the last expectation comprising trust in the citizen-government relationship is an expectation that the elected branches will exercise their control over social goods and services in a competent manner. I suggest that this expectation translates into an expectation that the elected branches will exercise said control in accordance with the principles of EBPM: that is, they (or, more accurately, their staff) will exhibit what Head has called political knowledge and practical implementation knowledge, and they will base their decisions on the best available evidence from research. Therefore, the final part to saying that citizens trust the elected branches with respect to social rights is that they expect them to use the foregoing EBPM principles in exercising their control over social goods and services.

D. What Would a Political Trust-Based Enforcement Framework Look Like?

So, what would a social rights enforcement framework based on political trust look like? As I explained earlier, it would, generally speaking, have the courts enforce the three expectations of trust, using those expectations to *ex ante* define the elected branches' obligations to citizens in exercising their control over social goods and services, and holding the elected branches accountable for their failure to fulfill those obligations. Using the three expectations as translated here for the specific context of social rights, the elected branches' obligations would be, in broad terms: (a) to not behave intransigently and to employ fair procedures, including those which are transparent, participatory and respectful of citizens' right to equality; (b) to ensure that their staff's interests do not sway their decisions, so as to unfairly discount or disregard citizens' or a subset of citizens' interests; and (c) to develop and implement their social policies and programs in accordance with the principles of EBPM.

Conclusion

My aim in this article has been to introduce a new concept—that of political trust—to the contentious and longstanding social rights enforcement conversation. While a great deal has been written on this conversation, I think that political trust, an unexplored area in the field, is a necessary addition. Hence, much like my contemporaries in other fields of law have argued in their respective scholarship, I have suggested that we have much to gain by considering political trust. Specifically, I have sought to make out the claim that political trust offers a promising basis for a social rights enforcement framework; and this is so for the instrumental, theoretical and practical justifications which I have set out in this article. Granted, much work remains to be done in this area. Further work must be performed to fully develop such a framework, including translating political trust's three expectations into judicially enforceable obligations on governments. For this reason, I have not endeavoured to apply the three expectations to social rights jurisprudence. Such analysis is, I think, best left for another day when the framework is more fully developed. That said, my discussion in this article, by justifying political trust's use as the basis for such a framework and taking steps to conceptualize it in this context, provides a solid footing upon which that work can be built.